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NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

THE STATE OF TEXAS,
Petitioner

v.

CLAUDE LEE WILKERSON,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

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QUESTIONS PRESENTED

I.

SHOULD *EDWARDS v. ARIZONA* BE APPLIED RETROACTIVELY?

II.

CAN A VIOLATION OF THE RULE STATED IN *EDWARDS* BE CURED IF A WAIVER OF THE ACCUSED'S *MIRANDA* RIGHTS OCCURS BEFORE THE INCRIMINATING EVIDENCE IS OBTAINED?

III.

SHOULD THIS COURT OVERRULE OR MODIFY THE HOLDINGS OF *MIRANDA v. ARIZONA* AND *EDWARDS v. ARIZONA?*

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Petitioner respectfully requests that a writ of certiorari issue to review the decision and judgment of the Court of Criminal Appeals of Texas in the case of The State of Texas v. Claude Lee Wilkerson, number 68,937 in the court below, which reversed Respondent's conviction for capital murder.

OPINION BELOW

The opinion of the Court of Criminal Appeals of Texas in this cause, No. 68,937 on the docket of that court, is reproduced in the Appendix "A". The opinion is not yet commercially reported.

JURISDICTION

The Court of Criminal Appeals rendered its decision on May 18, 1983. The State timely filed its motion for rehearing, accompanied by a motion for leave to file for rehearing, as required by Texas state appellate rules. The Court of Criminal Appeals denied the motion for leave to file for rehearing on July 10, 1983. The State then timely filed a second motion for rehearing, accompanied by a motion for leave to file for rehearing, pointing out *inter alia* that this Court has recently agreed to review the question of the retroactivity of *Edwards v. Arizona,* 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981). The Court of Criminal Appeals denied the second motion for leave to file for rehearing on September 14, 1983. Thereupon the State filed a motion to stay issuance of the mandate by the Court of Criminal Appeals. On September 19, 1983 the Court of Criminal Appeals stayed issuance of its mandate for a period of thirty days.

Juridiction of this Court is invoked under 28 U.S.C. Section 1257(3), which states in part that "a final judgment by the highest court of a State in which a decision could be had may be reviewed by the Supreme Court . . . by writ of certiorari, . . . where any . . . right . . . is . . . claimed under the Constitution . . . of the United States." The decision of the Court of Criminal Appeals was clearly based on the Fifth and Fourteenth Amendments of the United States Constitution and Supreme Court caselaw, primarily *Edwards, supra,* and *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 297 (1966). The Court of Criminal Appeals did not even discuss Texas state constitutional principles. There was

no independent state basis for decision. See *Michigan v. Long*, ____ U.S. ____, 103 S.Ct. 3469, ____ L.Ed.2d ____ (July 6, 1983).

CONSTITUTIONAL PROVISIONS AT ISSUE

The Fifth Amendment of the United States Constitution:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; *nor shall be compelled in any criminal case to be a witness against himself,* nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation. (Emphasis added)

The Fourteenth Amendment of the United States Constitution, Section 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; *nor shall any State deprive any person of life, liberty, or property, without due process of law;* nor deny to any person within its jurisdiction the equal protection of the laws. (Emphasis added)

STATEMENT OF THE CASE

I. Proceedings in the Trial Court

On February 17, 1978 the Respondent was charged by indictment with the felony of capital murder under V.T.C.A., Penal Code, Section 19.03(a)(2). The indictment alleged that the Respondent intentionally killed William Fitzpatrick while in the course of committing and attempting to commit aggravated robbery and aggravated kidnapping. The penalty for this offense is either life imprisonment or death. V.T.C.A., Penal Code, Section 12.31(a). Vital to the State's case was the appellant's written confession, in which the appellant described how he and three cohorts kidnapped three persons in the course of looting a jewelry store in Houston owned by one of the victims, Don Fantich. The Respondent's cohorts took the three victims to a farm in Shiner, Texas, and shot them. Until the Respondent gave his confession the police were not certain that the victims had been killed. The trial court admitted the Respondent's confession after conducting a hearing as required by *Jackson v. Denno,* 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964). The jury found the appellant guilty of capital murder. The jury then returned affirmative answers to the three special issues under Article 37.071(b), V.A.C.C.P. which are used to determine punishment. Accordingly the trial court assessed the death penalty.

II. Appellate Proceedings

The Respondent's conviction was automatically appealed to the Court of Criminal Appeals of Texas, as provided in Article 37.071(f), V.A.C.C.P. On appeal,

the Respondent argued *inter alia* that the introduction of his confession was in violation of his rights under Amendments V and XIV, United States Constitution, and Article I, Sections 10 and 19, Texas Constitution. The Respondent specifically argued that his confession was taken after he had invoked his right to discontinue any interrogation without the presence of his attorney, a right secured by this Court's interpretation of the Fifth and Fourteenth Amendments in *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 64 L.Ed.2d 297 (1966) and *Edwards v. Arizona,* 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981). By a 5-4 majority, the Court of Criminal Appeals held that the Respondent's rights under *Miranda* and *Edwards* were violated and that the written confession should have been suppressed. The four dissenting judges argued that the appellant had waived his right to the presence of counsel during interrogation when, during a chance meeting with his attorney at the offices where the interrogation had resumed, the Respondent told his attorney that he wanted to give a statement and that he did not need to have the attorney present. The decision was based entirely on federal constitutional law, with no mention ever being made of Article I, Sections 10 and 19 of the Texas Constitution.

The State's motion for rehearing stressed *inter alia* that *Edwards, supra* should not have been applied retroactively to the case at bar, wherein the confession was obtained and the Respondent convicted several years before the *Edwards* decision was issued. The Court of Criminal Appeals denied leave to file the motion for rehearing without any written opinion. In a second motion for rehearing, the State pointed out that this Court recently granted certiorari in *Solem v. Stumes,* 33 Cr. L. 4105,

No. 81-2149 (July 6, 1983) to review the question of the retroactivity of *Edwards*. Nevertheless, the Court of Criminal Appeals also denied leave to file the second motion for rehearing.

REASONS FOR GRANTING THE WRIT

OVERVIEW

At the outset it is important to note that the Court of Criminal Appeals misread the record in one important respect. The court below held that the Respondent asserted his right to converse with the police only with the aid of counsel, a right which is established in *Miranda, supra*. Based on this premise, the court below analyzed this case in terms of *Edwards, supra*. Actually the record does not reflect that the Respondent ever invoked that particular right under *Miranda*. Rather, the Respondent asserted the more general right to remain silent and terminate interrogation. For analytical purposes, this distinction is less important than it might appear, as will be explained. First, however, the reason for this confusion should be explained.

After the police obtained information leading them to suspect the Respondent in the disappearance of three people and a known robbery, the Respondent was detained on Tuesday, January 24, 1978. Attorney Fred Dailey was retained by a third party—Don Fantich's wife —to represent the Respondent. Dailey met with the Respondent before the Respondent appeared before a grand jury. The Respondent was released after his grand jury testimony. The next day, Thursday, the Respondent was admitted to a private hospital under arrangements made

by the District Attorney. That evening detectives and assistant district attorneys talked to the Respondent in the presence of counselor Dailey. After several hours, the Respondent announced that he did not want to have any further conversation with the authorities. Attorney Dailey also told a detective that he did not want the police to interrogate the Respondent further. Neither the Respondent nor Dailey ever made the conditional demand that interrogation take place only in the presence of counsel. The next day interrogation resumed at the police station, and later at the offices of the District Attorney. Counselor Dailey was not present. This further interrogation was initiated by the police.

As indicated above, the *Miranda* right to counsel was never specifically asserted. Even the Respondent's original brief referred to this right as "implicit" in the termination of the interrogation at the hospital. Certainly it was not an assertion of the right in the same context as *Edwards, supra,* where Edwards had no opportunity to consult counsel before he was interrogated.

Once the court below characterized the issue as one of right to counsel, it followed that *Edwards* would be pertinent. In *Edwards,* Edwards both asserted a general right to silence and demanded an attorney, but this Court found it sufficient to discuss only the latter *Miranda* right. Is the analytical framework of *Edwards* appropriate here? The Petitioner will reluctantly agree that it could be unless *Edwards* is overruled as urged in Part III *infra.* The Respondent did assert the right to remain silent, which if anything is broader than the right to delay interrogation until an attorney is summoned. Indeed, the question of "initiation" of further contact becomes important when counsel is demanded precisely because a subpart of

the right to counsel is the right to remain silent until counsel is available. The Petitioner submits that reinterrogation should be deemed valid following assertion of the right to terminate if reinterrogation is initiated by the accused. This case does not fit that scenario. Unfortunately, it follows that reinterrogation initiated by the police after a suspect terminates an interrogation should not be permitted. That the court below misread the record turns out to be of little significance.

Granted that the court below had to come to grips with *Edwards,* the real question is whether the court below applied *Edwards* correctly. For one or the other of the following alternative reasons, the application of *Edwards* was incorrect. This in turn depends on what the *Edwards* decision really means. First, if *Edwards* means that police initiation of reinterrogation indelibly tainted all that followed, regardless of other facts and circumstances, *Edwards* constitutes a new rule which should not have been applied retroactively in this case. Second, the Petitioner reads *Edwards* as leaving open the question of the correct result under the facts of this case, which are decisively different from those in *Edwards* and *Miranda.* Third, if conformity to *Edwards* requires retroactive exclusion of the confession because police initiation of reinterrogation was a per se violation of the Fifth Amendment, then the *Edwards* rule is unjust. Since that unjust per se rule was not necessary in *Edwards, Edwards* should be overruled. This Court should return to the pre-*Miranda* standard of analyzing the voluntariness of the confession based on the total facts of each case, rather than imposing mechanistic rules which elevate form over substance. At the very least, "initiation" should not be a threshold question, contrary to what *Edwards* indicates.

I.

EDWARDS v. ARIZONA CREATED A NEW RULE WHICH SHOULD NOT BE APPLIED RETROACTIVELY

The interrogation, confession, and conviction of the Respondent all occurred well before this Court issued its opinion in *Edwards v. Arizona, supra.* This raises the question whether the court below was correct in applying *Edwards* retroactively to this case. This issue was raised by the Petitioner in the Motion for Rehearing, but the Court of Criminal Appeals has totally failed to address this question. *Edwards* has been applied retroactively in several jurisdictions, including Texas. See *Coleman v. State,* 646 S.W.2d 937 (Tex. Crim. App. 1983); *State v. Brown,* 317 N.W.2d 714 (Minn. 1982); *United States v. Hinckley,* 672 F.2d 115 (D.C. Cir. 1982). Other jurisdictions have held that *Edwards* should not be applied retroactively. *State v. McCloskey,* 90 N.J. 18, 446 A.2d 1201 (1982); *State v. Shea,* 421 So.2d 200 (La. 1982). However, this Court has never addressed the question of retroactivity. Review by this Court is warranted under Rule 17.1(b) and (c) of this Court. Although Minnesota's petition for writ of certiorari was denied on July 6, 1983 in *Minnesota v. Brown,* 33 Cr. L. 4106, this Court granted certiorari in *Solem v. Stumes,* 33 Cr. L. 4105 (July 6, 1983), in order to address the question of the retroactive application of *Edwards v. Arizona.* In *Stumes v. Solem,* 671 F.2d 1150 (8th Cir. 1982), the Eighth Circuit held that *Edwards* applied retroactively to a federal habeas corpus petition after exhaustion of Stumes' direct appeal. Unlike *Solem v. Stumes,* the case at bar presents the question of the retroactive applicability

of *Edwards* to a direct appeal which is not yet final. This cause is an appropriate companion to *Solem v. Stumes* on the retroactivity question.

Actually, there are two questions concerning retroactive application of *Edwards* here. First, there is the question whether the general rule stated in *Edwards* should be retroactive. The holding of *Edwards* was that where Edwards asserted his right to have counsel present during interrogation, interrogation could only continue if counsel were provided or if Edwards had initiated the subsequent dialogue with the police. This Court held Edwards' confession inadmissible because counsel was not provided and the subsequent interrogation was initiated by the authorities, not by Edwards. The meaning of the *Edwards* rule was discussed in *Oregon v. Bradshaw,* ____U.S.____, 103 S.Ct. 2830, ____L.Ed.2d____ (June 23, 1983). As noted in Justice Powell's concurring opinion in *Bradshaw,* 103 S.Ct. at 2836, both the plurality opinion and the dissenting opinion in *Bradshaw* viewed *Edwards* as establishing the "initiation" question as the first step of a two-step analysis, the second step being the application of the standard under *Johnson v. Zerbst,* 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938) that requires examination of the "totality of the circumstances." That is, determining who initiated the interrogation becomes a threshold question under *Edwards,* such that the State's failure to show that the accused initiated reinterrogation automatically renders the fruits of that reinterrogation inadmissible. Although Justice Powell noted some confusion among lower courts whether *Edwards* indeed created a per se rule, Justice Marshall's dissent in *Bradshaw,* 103 S.Ct. at 2840, fn.2 states "In my view, *Edwards* unambiguously established such a rule."

Second, the present cause contains one important factor not found in *Edwards.* Between the time that the police initiated reinterrogation and the time they obtained the confession from the Respondent, the Respondent met with his attorney. Even if the per se rule of *Edwards* should be applied retroactively on facts similar to those in *Edwards,* the Petitioner submits that application of *Edwards* so as to nullify the curative effect of such an intervening event should not be done retroactively.

The principles of retroactivity were recently discussed in *United States v. Johnson,* ____U.S.____, 102 S.Ct. 2579, ____L.Ed.2d____ (1982). *Johnson* suggests the following guidelines: (1) First this Court should determine whether a decision "merely has applied settled precedents to new and different factual situations" or establishes a new rule that "was unanticipated." 102 S.Ct. at 2587. A finding that a decision merely applies old precedents requires that the decision be given retroactive effect. (2) If this Court finds that the new rule was unanticipated, it should determine retroactivity under criteria suggested in *Stovall v. Denno,* 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1967): (a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standard, and (c) the effect on the administration of justice of a retroactive application of the new standards. *Johnson, supra,* 102 S.Ct. at 2584, 2587.

In his concurring opinion in *Edwards,* 101 S.Ct. at 1888, Justice Powell observed that the focus on "initiation" as a threshold question was a clear departure from the old test of *Miranda* that weighed the totality of the circumstances. The *Edwards* majority opinion tacitly ac-

knowledged that this was a new rule, in that the opinion stated the rule as a holding, without citing any prior case which had stated this rule as a decisive principle. 101 S.Ct. at 1884-1885. Footnote 9 of *Edwards* stated that the Fifth Circuit had held in two cases that initiation by an accused of subsequent interrogation was necessary, but those two cases do not necessarily support the view that a two-step approach, beginning with the question of initiation, is required by *Miranda.* In *Oregon v. Bradshaw, supra,* both the plurality and the dissent refer to *Edwards* as if it made a new rule. Justice Rehnquist wrote of "the *test laid down* in *Edwards.*" 103 S.Ct. at 2834. (Emphasis added). Justice Marshall wrote *"Edwards* unambiguously *established* such a (per se) rule." 103 S.Ct. at 2840, fn. 2 (Emphasis added).

The Petitioner also notes that *Miranda* itself was not given retroactive application. *Johnson v. New Jersey,* 384 U.S. 719, 86 S.Ct. 1772, 16 L.Ed.2d 882 (1966). Common sense dictates that because *Miranda* is the prior opinion most pertinent to *Edwards,* the same policy regarding retroactivity which applied to *Miranda* also should apply to *Edwards.*

Even if the general rule of *Edwards* was foreshadowed prior to the interrogation and the trial of the Respondent, there is still the question whether the general rule precludes consideration of the effect of a curative event such as occurred herein. That interpretation of *Edwards* clearly was *not* foreshadowed by prior decisions. *Miranda,* of course, involved no curative event. A rule which focuses on initiation to the total disregard of subsequent events is inconsistent with *Michigan v. Mosley,* 423 U.S. 96, 96 S.Ct. 321, 46 L.Ed.2d 313 (1975). In that case

subsequent police-initiated interrogation regarding a different offense was allowed even after Mosley invoked his right to remain silent. Yet application of the per se rule from *Edwards* apparently would have barred that second interrogation in *Mosley,* for only if other circumstances besides initiation are given weight does it really matter whether the two interrogations were about the same offense.

Under the first part of the *United States v. Johnson* test, retroactive application of *Edwards* is not required—at least not where intervening events may establish a valid waiver. The next question is whether *Stovall* criteria call for prospectivity or retroactivity. This is essentially a policy question.

Regarding the "purpose" criterion, the analysis used in *Johnson v. New Jersey* is instructive here. *Johnson* pointed out that conduct which constituted violations of the newly stated *Miranda* requirements could be presented as grounds for reversal under a pre-*Miranda* "substantive test of voluntariness," rather than by retroactive application of *Miranda* requirements per se. 384 U.S. at 730. Under the same sort of reasoning, a defendant whose complaint is that a subsequent interrogation was initiated by the police may present that argument under the pre-*Edwards* totality of circumstances standard for determining waiver. In fact the Respondent herein did that in his appellate brief. The same overall purpose is served by either test, so refusal to apply *Edwards* retroactively does not deny satisfaction of some important protective purpose.

Turning to the measure of reliance on old law, it is obvious from the numerous cases in which *Edwards* has

been raised as a basis for reversal—including cases of the utmost importance with the most careful investigative attention, such as the instant capital murder case or the *Hinckley* case—that police have relied on an interpretation of *Miranda* other than the focus on initiation stated in *Edwards*. Moreover, trial and appellate courts have tried in good faith to apply the totality of circumstances test for waivers which was used prior to *Edwards*. Certainly the trial court in this cause did so, conducting a very lengthy suppression hearing in order to probe all the factors surrounding the confession. Thus policy factors indicate that *Edwards* should not be applied retroactively to this cause.

II.

EVEN IF THE RESPONDENT'S *MIRANDA* RIGHTS WERE VIOLATED BY REINTERROGATION INITIATED BY THE POLICE, THE CONFESSION WAS NOT TAINTED BECAUSE IT WAS TAKEN ONLY AFTER AN INTERVENING EVENT ESTABLISHED WAIVER OF *MIRANDA* RIGHTS

Even if *Edwards* applies retroactively and compels the conclusion that the reinterrogation initiated by the police was in violation of the Respondent's *Miranda* rights—whether the right to remain silent, the right to counsel, or both—the question remains: So what? Neither *Miranda* nor *Edwards* addressed a set of facts where some event occurred between the violation of *Miranda* rights and the taking of the confession which established a valid waiver of *Miranda* rights. Such an intervening event occurred in this case. This Court's Rule 17.1(c) warrants review of this question.

As previously mentioned, counselor Dailey was not summoned when reinterrogation was initiated by the police. However, eventually he did go to the District Attorney's office. There he was refused access to his client because the Respondent had not asked for him. Meanwhile, during further conversations with the police, the Respondent decided to go ahead and give a confession. Apparently this decision was greatly influenced by a half-hour conversation the Respondent had with Mrs. Fantich, for whom the Respondent had a great deal of concern. The Respondent orally recited what he knew about the crime.

Before a written statement was made, the Respondent and a detective went to a water fountain in the hall. There, apparently by accident, the Respondent met attorney Dailey. Dailey told the Respondent to terminate the interrogation. The Respondent answered that he "had to" give a confession, though not because he was being pressured by the police. "It's my own personal reasons," the Respondent told Dailey, "You know, I have to tell the truth." Dailey told the Respondent that he would be waiting nearby if the Respondent needed him. The Respondent returned to the interview room, where, after receiving *Miranda* warnings again, he gave a written confession. Dailey talked to the Respondent later and concluded that the Respondent had confessed voluntarily.

Miranda, 384 U.S. at 479, and its progeny—as well as *Miranda's* forerunner, *Escobedo v. Illinois,* 378 U.S. 478, 84 S.Ct. 1758, 12 L.Ed.2d 977 (1964)—chose an "exclusionary rule" as a remedy for violations, barring the use as State's evidence of a confession taken in violation of the rules established in those cases. This Court

was primarily concerned with the ultimate *admission of evidence* in violation of *Miranda,* for only if evidence is admitted does "incrimination" occur. Interrogation in violation of *Miranda* cannot warrant reversal unless it produces evidence which is admitted against the defendant.

In the case at bar, none of the Respondent's statements made during the interrogation prior to the meeting at the fountain were admitted in evidence against him. The State only used the written confession which was prepared and signed *after* the appellant met attorney Dailey at the water fountain.

The meeting at the water fountain was an event which purged the taint of the prior police conduct. This meeting did not merely bolster the other evidence which indicated that the appellant had voluntarily decided to give a confession. The conversation at the fountain squarely addressed the question of the Respondent's assertion of *Miranda* rights—Did he or did he not want to remain silent? Did he or did he not want counsel present? The evidence shows clear statements by the Respondent at this time constituting waivers of the right to silence and the right to the presence of counsel while making a written confession. It was no agent of the State who presented the question of *Miranda* rights to the Respondent at the water fountain, but rather his own attorney. In response to questions posed by his own attorney, the Respondent gave answers which established all the necessary requirements for a valid waiver of constitutional rights under the well-known test of *Johnson v. Zerbst,* 304 U.S. 458, 464, 58 S.Ct. 1019, 1023, 82 L.Ed. 1461 (1938). As paraphrased in *Edwards,* 101 S.Ct. at 1883, this test is "a knowing and intelligent relinquishment or

abandonment of a known right or privilege." All the elements of this test were satisfied by the meeting at the fountain, as will be described more fully in Petitioner's brief if the petition is granted.

Given that the evidence of the meeting at the water fountain shows a valid waiver under the *Johnson v. Zerbst* standard, particularly in light of other testimony regarding the preceding interrogation, which the trial court found to be noncoercive, the majority opinion of the Court of Appeals is incorrect unless *Miranda* and *Edwards* are read as forbidding such a meeting to ever take place on the thesis that the Respondent should not have been in an investigative office at all. As discussed in Section I *supra,* both the plurality and the dissenting opinions in *Bradshaw* adopted the view that *Edwards* created a two-step analysis, with initiation of reinterrogation being the first step of the analysis, or as stated above, a threshold question. However, the exact wording of the rule stated in *Edwards* left open the question whether improper initiation of reinterrogation by police could be cured by contact between an accused and counsel prior to the obtaining of a confession:

> We further hold that an accused, . . . having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges or conversations with the police. 101 S.Ct. at 1885.

This language literally indicates there are two ways for subsequent interrogation to be valid: (1) counsel is made available, or (2) the accused initiates further com-

munication. The facts in *Edwards* fit neither alternative. Since the facts in *Edwards* (like the facts in *Miranda* and *Bradshaw*) did not include a meeting with counsel between initiation of reinterrogation and the taking of evidence used at trial, there was no need for the Court to hypothetically decide what the effect of such an intervening meeting with counsel might be. The Petitioner submits, however, that a meeting with counsel, where counsel unequivocally urges the accused to remain silent, clearly satisfies any Fifth Amendment right to counsel under *Miranda*. It is equally clear to the Petitioner that this Court would not have added the phrase "unless counsel is made available" to its statement of the rule in *Edwards* unless this Court intended that this was an alternative avenue showing a waiver of the previously asserted right. The Petitioner submits that the facts herein fit that alternative method of validating reinterrogation.

The harder question is whether the meeting with counsel could cure the violation of the *Miranda* right which the record shows was actually asserted—the right to remain silent and terminate interrogation. The answer should depend on two factors: (1) Did counsel discuss this right with the accused prior to the taking of the confession used as evidence? (2) Does the evidence indicate a knowing and voluntary waiver of the right to remain silent? Where, as in the case at bar, the answer to both questions is yes, the meeting with counsel should be sufficient to cure the taint of improper procedure prior to the meeting.

III.

THIS COURT SHOULD ABANDON THE MECHANICAL RULES OF *MIRANDA* AND *EDWARDS* IN FAVOR OF AN INQUIRY INTO VOLUNTARINESS BASED ON THE TOTALITY OF CIRCUMSTANCES

As a final alternative position, the Petitioner submits that *Edwards* and *Miranda* were incorrectly decided. Both adopted mechanical approaches which treat the procedures used by the police as more important than the substantive question of the voluntariness of a confession. It almost seems as if the Fifth Amendment itself has become lost in the jurisprudence which purports to apply it. The Fifth Amendment protects an accused against being compelled to incriminate himself. A confession which is given voluntarily is the antithesis of a compelled or coerced confession. The proper inquiry in Fifth Amendment cases is a simple decision—was the confession voluntary or involuntary?

The premise for the *Miranda* decision was that interrogation has certain inherently coercive characteristics, and it was the purpose of the mechanical approach taken in *Miranda* to counteract these coercive influences. A major flaw in the majority opinion in *Miranda,* as pointed out by the dissenters in that case, was that the prophylactic rules adopted by the majority were elevated above the broader question of voluntariness. Prior to *Miranda,* the Supreme Court did not regard any one factor or set of factors as preclusive on the question of voluntariness. After *Miranda,* almost no amount of evidence tending to show that a confession was in fact voluntary could suffice if the evidence showed a failure to warn an accused

of his rights or a failure to honor those rights. As the *Miranda* dissenters pointed out, this Court's pre-*Miranda* treatment of confessions was more "judicial" in that it treated one case at a time, and therefore was "flexible in its ability to respond to the endless mutations of facts presented." 384 U.S. at 508.

Setting aside for a moment the Respondent's assertion of his right to terminate interrogation, the evidence in the present cause established that the confession was voluntary. First, the record reflects that multiple warnings were given to the Respondent. He had been advised by counsel, and before giving the only confession which was admitted he was advised by counsel again. Nevertheless, the Respondent explained that he was motivated by personal reasons, especially his feelings for the family of Don Fantich, to go ahead and tell the truth. Asked if he was subjected to any form of duress, the Respondent denied that such duress occurred. Based on the totality of the circumstances, it appears that the trial court correctly concluded that the Respondent's confession was voluntary.

The Petitioner does not suggest that assertion of the right to remain silent or a demand for counsel is unimportant. Of course these rights are important, for abuse of these rights carries the potential for coercion, as the *Miranda* opinion explained. However, these factors should be weighed together with all other pertinent evidence, rather than being regarded as decisive by themselves. The pre-*Miranda* approach did not foreclose proper consideration of the initiation of reinterrogation in violation of the protective devices deemed necessary by the *Miranda* majority. *Johnson v. New Jersey, supra*—an opinion

by Chief Justice Warren, who authored the *Miranda* majority opinion—acknowledged that the same "abusive practices" which *Miranda* was aimed at curing could be attacked under the pre-*Miranda* standards. 384 U.S. at 730-731. Thus the Petitioner proposes that this Court partially overrule *Miranda*. Although an exclusionary rule may be retained as the remedy for an involuntary confession, this Court should analyze the admissibility of confessions in terms of the voluntariness of the confession and the reliability of the confession. In *Brown v. Louisiana*, 447 U.S. 32, 100 S.Ct. 2214, 2219-2220, 65 L.Ed. 2d 159 (1980), this Court referred to "the accuracy of guilty verdicts" and "the reliability and integrity of the fact finding process" in deciding a question of retroactivity. The truthfulness or reliability of a confession should be considered in deciding whether it may be admitted or must be suppressed.

The mere fact that *Miranda* has become deeply entrenched in our jurisprudence, through the passage of time and through its use as precedent, does not preclude this Court from overruling or modifying the rules it established. *Aguilar v. Texas*, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964) adopted a mechanical "two-pronged test" for probable cause under the Fourth Amendment. Even though *Aguilar* was of even older vintage than *Miranda*, this Court recently abandoned the mechanical approach of *Aguilar* in *Illinois v. Gates*, ____ U.S. ____, 103 S.Ct. 2317, ____ L.Ed.2d ____ (1983).

Even if this Court adheres to the majority opinion in *Miranda*, *Edwards v. Arizona* should be overruled. In the years between *Miranda* and *Edwards*, a substantial jurisprudence developed on the issue of waiver of *Mir-*

anda rights. The cornerstone of this jurisprudence was the standard for voluntariness of waivers stated in *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S.Ct. 1019, 1023, 82 L.Ed. 1461 (1938), cited in Chief Justice Burger's concurring opinion in *Edwards*, 451 U.S. at 488:

> A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege. The determination of whether there has been an intelligent waiver . . . must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused.

The traditional *Zerbst* analysis allowed for due consideration of the question of initiation, as well as other factors. There was no need for the *Edwards* majority to adopt a new per se rule based on the question of initiation of reinterrogation. Indeed, Chief Justice Burger and Justices Powell and Rehnquist concurred in *Edwards*, finding that there was not a valid waiver without utilizing what *Oregon v. Bradshaw* correctly characterized as a two-step process. The *Edwards* majority opinion unnecessarily adopted a bad rule based on aggravated facts in one case. As Justice Powell observed, 101 S.Ct. at 1888, "Few cases will be as clear as this one." The Petitioner agrees with Chief Justice Burger that "the extraordinary protections afforded a person in custody suspected of criminal conduct are not without a valid basis, but as with all 'good' things they can be carried too far." 101 S.Ct. at 1886. The Court should abandon the per se rule of *Edwards*.

CONCLUSION

For the aforesaid reasons, the Court should grant the petition for writ of certiorari.

Respectfully submitted,

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APPENDIX

NO. 68,937

CLAUDE LEE WILKERSON, Appellant

v.

THE STATE OF TEXAS, Appellee

Appeal from HARRIS County

OPINION

This is an appeal from a conviction for capital murder in which the punishment was assessed at death.

Because of our disposition of appellant's seventh ground of error, a detailed recitation of the facts constituting the offense is obviated.[1] That ground of error contends the trial court erred in admitting appellant's inculpatory statement "which was involuntarily obtained in violation of the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States and Article I, Sections 10 and 19 of the Constitution of the State of Texas."

Prior to trial, appellant filed a motion to suppress his written statement on grounds conforming to the above allegation. The trial court conducted a hearing on the motion, at the conclusion of which he dictated his findings of fact, conclusions of law[2] and his decision to over-

1. Appellant does not contest the sufficiency of the evidence to support the jury's verdict of "guilty."

2. Paraphrased, the salient findings of fact are: (1) appellant was given repeated warnings by law enforcement officers, a magistrate and an assistant district attorney prior to his statement; (2) no force, threats, promises or other undue influence was applied; (3) appellant

rule the motion to suppress. Appellant again raised the issue during trial on the merits and requested its submission to the jury, which request was denied.[3] The issue was also urged on motion for new trial.

The material facts are not in dispute. Appellant was arrested without a warrant on Tuesday, January 24, 1978, apparently because he had been observed driving the car of one of three persons who had been reported missing the preceding day and who appeared to have been victims of a robbery. At approximately 3:00 p.m., the Honorable Fred Dailey received a call from Pat Fantich, the wife of one of the missing persons, who advised him appellant wanted to talk to him about legal representation. Dailey proceeded to the Robbery Division of the Police Administration Building where he spoke with and was retained by appellant.

At approximately 8:00 p.m., appellant was escorted by Detective Joe Williams to the courtroom of Municipal Judge Rosemary Saucillo, where he was warned of his rights;[4] appellant acknowledged his understanding. He was given a copy of the written warning which also had

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"had access or actually conversed with or was counseled by" the retained attorney of his choice "at all times;" and (4) the statement "was freely and voluntarily made and therefore admissible for consideration by the finders of fact."

3. The trial court's ruling on his objection and requested addition to the charge in this respect, forms the basis of appellant's sixth ground of error.

4. As a part of the warning, appellant was told:
"You have been *accused* of the offense of robbery and kidnapping." [All emphasis is supplied throughout by the writer of this opinion unless otherwise indicated.]
Detective Williams conceded there was insufficient evidence to *charge* appellant with these offenses, only enough to "accuse" him.

a line struck through the portion dealing with bail. Appellant's attorney was waiting for him on his return to Robbery Division.

The next morning, Wednesday, January 25, at 8:00 a.m., attorney Dailey met appellant at the city jail, then later that morning, they met in the grand jury anteroom of the Harris County Court Annex, along with Assistant District Attorney Mike Hinton and a Detective Beale. Appellant, according to Hinton, was afraid and apprehensive; he did not want to testify and "if he knew anything, he did not care to divulge it."[5] Appellant ultimately decided to testify. Hinton warned him of his rights and on two occasions appellant interrupted his testimony to consult with Dailey outside the grand jury room before answering questions. After testifying for two hours before the grand jury, appellant was "released."

The next day, Thursday, January 26, Hinton left a telephone message for appellant to call him. When appellant returned the call in the early afternoon, Hinton apparently told him he wanted to meet so they could talk. According to Hinton, appellant "indicated he wanted to talk further [but] he said he did not have any transportation." Appellant also complained to Hinton of severe pain he was having due to an arm injury which had become infected. Hinton arranged to have appellant admitted to the private Rosewood Medical Center, telling the owner-physician he "wanted to take precautions to protect him."

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5. Hinton testified that he talked with Dailey and appellant for a couple of hours trying to persuade appellant to give the grand jury the benefit of what he knew about the disappearances. He told appellant he was not the focus of the investigation and not to "be in fear of prosecution" for any past drug dealings or the like, though "there is no immunity from the offense of perjury."

Hinton's recollection was that appellant was admitted under an assumed name.[6] Appellant called his attorney, Mr. Dailey, from the hospital and the two spoke by telephone about five more times that day. In the interim, Hinton arranged to meet Dailey, Assistant District Attorney Don Stricklin and a Lieutenant Fulbright at the hospital late in the evening.

According to Dailey, he arrived at the hospital at approximately 9:00 p.m. and had consulted with appellant for approximately 30 minutes when Stricklin, Detective Jerry Carpenter (who was assigned to the D.A.'s Special Crimes Division) and a Robbery Division Lieutenant—apparently Fulbright—entered appellant's room. Stricklin started a conversation with appellant "about cars" and "asked [him] how he moved around." According to Dailey's testimony elicited on direct examination by Prosecutor Stricklin,

> "And he gave you an answer that you weren't satisfied with. Because you felt it was kind of vague. And then, you got rather specific about whether he used Dan Fantich's Mercedes. And he denied that, rather vehemently. And you and he began to have rapid and heated discussions about—around the car. And he did not want to answer you at all. And finally you got up and said 'I will wait until Mike [Hinton] gets here.' And I said, 'That's probably a good idea.' "

Everyone but Dailey left appellant's room.

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6. Quizzed on cross examination about why appellant was not admitted to the County Hospital, Ben Taub, Hinton insisted he did not know what kind of situation he was dealing with because appellant continued to indicate that one reason for not talking was his fear for his own safety. Hinton felt appellant would be more secure in the private hospital. However, the record reflects appellant was admitted under his own name.

Mike Hinton, who all witnesses agreed had developed a degree of rapport with appellant, arrived at the hospital at approximately 10:00 p.m. Hinton and Carpenter entered appellant's room, and in the presence of Dailey, Hinton began pleasant conversation. But eventually, according to Dailey,[7] "Hinton broke the news to Mr. Wilkerson, . . . that he felt he knew and could prove that Wilkerson had lied four times before the Grand Jury [the day before] and that he . . . could file on them. But, that he, Hinton, would give Wilkerson a chance to make up for it. That he would not file the charges if Wilkerson would come clean and tell him what he knew about Fantich's disappearance." This conversation lasted approximately 30 minutes and at its conclusion, Dailey asked if he could speak with his client alone for a moment.

According to Hinton, appellant was "genuinely trying to make a decision of whether to talk with the authorities." When Hinton reentered the room, another lengthy conversation occurred after which Dailey asked everyone to leave again; he consulted privately with appellant. According to Dailey, he stopped the "questioning or interrogation" two or three times "before they pushed any further." The third time Hinton and Detective Carpenter entered, the conversation lasted for about two hours, and, according to Dailey,

> "It seemed to lead nowhere and contained no real substance. But, at some point Claude Wilkerson finally got around to telling Mike Hinton that *he wished to say no more and cooperate no further* with

7. Though the testimony of Dailey, Hinton and Carpenter as to the sequence of the conversations between Hinton and appellant that night, conflicts in minor detail, the substance of those conversations is undisputed.

> the District Attorney's Office or the Police Department in the investigation concerning the disappearance of the three people."[8]

The interview was at that point terminated; Hinton told appellant "I hope you know what you are doing," and advised him he was under arrest for perjury[9] and would be left in the custody of the officers. The prosecutors left.[10] Detective Carpenter pulled his chair up to appellant's bed and began some "small talk."

Dailey testified that at this point,

> "I told Jerry Carpenter that I didn't want any more interrogation. And I didn't want any more conversations. That Wilkerson had told me that he didn't want to say anything. * * * So, the whole time I felt like [appellant] and I [had been] in control of the situation. And we could stop it at any time and we did, two times. [When I left the hospital] I felt like [the District Attorney's Office and Houston Police Department] understood [there was to be no more questioning of my client]."

Dailey stated he left the hospital feeling "as satisfied as I could be as a defense lawyer" that his instructions "would be honored and adhered to."

Carpenter testified that he had read appellant his rights when he was placed under arrest, and had called for a

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8. Hinton also testified appellant stated he did not want to talk anymore.

9. No charges had been, or ever would be, filed against appellant for perjury.

10. Hinton's testimony was "then Mr. Dailey and I parted ways from the hospital, thinking that Claude was just going to—just not talk to anybody."

uniformed officer to take custody of appellant. Carpenter was asked:

"Q: Did Mr. Dailey tell you anything in his client's presence as to whether or not his client was willing to make a statement or to talk?

A: *Yes. I believe it was in Mr. Wilkerson's presence* at—near the end of this period of time before he was arrested. *Mr. Dailey made it known that he didn't want us to talk to him or question him any more about this case.*

Q: State whether or not you questioned the defendant about the case or talked with him after Mr. Dailey left?

A: I did. I made a statement to him.

Q: What was that statement?

A: *I told him that I understood that Mr. Dailey didn't want us to talk to him or question him in regard to this case.* But, I told him I wanted him to know that if he wanted to talk to me about the case and tell me the truth, that it was his decision and nobody else's.

Q: Did you say anything else?

A: Not after his response.

* * *

Q: What was his response?

A: *He indicated he did not want to talk about it.*"

When a uniformed officer arrived, Carpenter instructed him that though appellant was under arrest, he was a patient in the hospital, so when he was released from the hospital, he was to be taken to city jail. It was approxim-

ately 2:00 a.m. on Friday, January 27, when Carpenter left these instructions.

The record of the motion to suppress hearing is silent as to the whereabouts of appellant for the subsequent 12 hours.

However, the record reflects that on Friday morning, Fred Dailey received a message that a hearing had been scheduled at 9:00 a.m. that day for the purpose of setting a "material witness" bond for appellant. Dailey called to say he would be late and was told it did not matter because the hearing had been rescheduled for 11:00 a.m. Later in the morning, Dailey contacted the court by phone again, and was told, "No, it will be held at 1:30." So, at 1:30 p.m., Dailey went to the courtroom, but found no one connected with the case was present. The judge of the court told Dailey that the D.A.'s Special Crimes Bureau had just called and, "they are waiting for you over there."

On his arrival, Dailey testified, "I probably asked the receptionist where the people involved with Claude Wilkerson and the officers and all, where they were.[11] * * * I probably asked if I could see him. And they announced that he had not asked for me." On cross-examination, Dailey explained his failure to "demand" to see his client thus:

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11. Catherine McMaster, a secretary for the Special Crimes Division, testified in this vein as follows:

"Q: Did Mr. Dailey ever ask you to make arrangements to see his client?

A: Yes, sir, he did.

Q: And did you do that?

A: No, sir, I did not. I did not know who his client was.

> "I have had the same kind of run-ins, I am sure you have had with the police. I have been told that it's not an absolute right to see a client, that if a client wants to see me that he would be allowed to see, [sic] governed by certain rules concerning jails and police administration. And so, I asked to see him and the [sic] said, 'He has not asked to see you,' that's where it stopped."

However, Dailey testified:

> "I asked various people several times during the afternoon if they had seen him. And if he had asked to see me. * * * I was told 'No.' That he had not asked to see me."

Meanwhile, Detective Earl Musick arrived at the Robbery Division of the Houston Police Department, at approximately 2:00 p.m. and encountered appellant in the custody of a Detective Burkham. Musick "enter[ed] into a conversation" with appellant who "told [him] that he wanted to tell the truth about this incident. That he wanted to talk with Pat Fantich before he would tell the truth." Musick began effectuating the request.

Mike Hinton testified that at 3:00 p.m., he "received word"—he could not remember from whom or by what means—that appellant "wanted to talk to [him] again." According to Hinton, he had already made arrangements for appellant's attorney to be at the Special Crimes Bureau.[12] Evidently Hinton had appellant brought to

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12. According to Hinton, he was the person who was communicating with appellant's attorney that day, and who "had the primary function of communicating with Claude Wilkerson's attorney until he waived his right to have an attorney."

the D.A.'s office.[13] Hinton spoke with appellant for only five minutes. Appellant expressed his fear for the safety of Pat Fantich and her children and apparently advised Hinton he had decided to talk on the condition he could first talk personally with Pat Fantich. Appellant was allowed a thirty minute taped interview[14] with Mrs. Fantich at which time they were interrupted by Detective Musick who asked him what decision he had made.

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13. Asked to explain the basis of appellant's custody, Hinton testified:

> "There was a discussion between the defendant and his counsel about the possibility of an aggravated perjury indictment. *But, he had not been filed on.*
>
> *So, at the time he was brought up to my office, instead of taking that avenue,* after consultation with Mr. Vance and my colleague, Mr. Stricklin, *it was decided not to file on him for any criminal offense.* And we had requested time from Judge Moore to present evidence and to justify and ask the Court to set a material witness bond.
>
> And Mr. Wilkerson and my conversation with Mr. Wilkerson in the office of the Special Crimes was before we got to the material witness bond hearing. *And as it developed we never had the hearing. There was no formal charges filed on the defendant at that time* and had not been previously. But, rather than exercise a perjury avenue, we thought—*we still didn't know what happened and what was going on in the disappearance of the three.*
>
> We decided to utilize the material witness bond. And *that was never formalized.* And my testimony will be that he was in custody as a material witness. At that point, we felt that he had enough information in that *I was very reluctant to turn him loose again,* but *we didn't know what the answer* was *as to the disappearance of the three.* We had some indication of his involvement."

It is clear from this testimony that there *was no* legal basis for appellant's custody and the State was in a bind: if a perjury indictment was filed the agreement with appellant not to charge him if he told the truth would be broken: if a bond was posted, appellant would walk free without telling what he knew.

14. At the time of trial, the State had misplaced this tape. It was never found.

Appellant said he was "ready to tell the truth." Musick and Detective Beale took appellant to Stricklin's office, where appellant told the story of robbery, kidnapping and murder which forms the basis of his conviction. Musick had appellant tell the story again. Musick then read appellant his rights and the waivers. After Musick read, "You do not want to consult with a lawyer before making this statement and you do not want to remain silent," appellant said, "Hold it a minute. I want to talk to Mike Hinton." Appellant was allowed to speak to Hinton. Musick repeated the warnings; appellant said he understood. Musick then took appellant to Catherine McMaster's office in order to have his statement typed. The typing had begun when appellant asked to use the restroom; Musick escorted him down the hall.

At approximately 5:00 p.m. or later, as appellant's attorney, Fred Dailey, walked down a corridor of the Special Crimes Bureau, he confronted appellant, accompanied by Detective Earl Musick, who had approached the corner from an opposite direction, by a water fountain. Dailey's description of the exchange:

> "I don't recall how I greeted him. There might have been some degree of shock involved in meeting him that way. But, I know I asked if he was doing what he wanted to. And he replied, 'No, not really.' And I said, 'Then stop it.' And he said, 'No, I have to. I have to do it.' And I said, 'Well, then, what you are really saying is, you are doing what you want to do but you don't like it?' and he said, 'Yeah, I guess so.' * * * I said, 'Well, I've been here and I will be here if you want me. I'm here.' "

Dailey stated appellant neither asked to speak with him, nor told him to go away. Dailey also testified after seeing

appellant at the water fountain, he was satisfied the latter did not want to see him.[15]

Musick and appellant returned to Catherine McMaster's office where his statement was reduced to writing and edited and signed.

Dailey saw appellant once more that night at approximately 8:00 p.m. Dailey had been given a copy of appellant's statement, and he inquired about appellant's giving it; appellant replied: "I had to do it and you may not understand it, but I had to do it."

Fifth or Sixth Amendment Right?

The Supreme Court of the United States has in recent years clarified a distinction between the *Sixth* Amendment right to the assistance of counsel—"that a person is entitled to the help of a lawyer *at or after the time judicial proceedings have been initiated against him* [ ] 'whether by way of formal charge, preliminary hearing, indictment,

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15. Detective Musick recalled the encounter as follows:

"Fred asked Claude if he was sure that he did not want to talk to him and Claude said, 'Yes.'

Fred asked Claude if he knew what he was doing. Claude said, yes, he did. He asked Claude, 'Are you doing what you want to do?' Claude then said, 'I do not guess anyone would want to give a confession, but you know, I have to.'

And Fred said, 'Now, wait a minute. You have to?' And he said by this, 'Are you saying that they are threatening you? Are they making you do something you don't want to do?' Claude said, 'No. They have nothing to do with it. It's my own personal reasons. You know, I have to tell the truth.'

And Fred said, 'Well, you know you know what I have advised you and are you aware of all this?' And he said, 'Yes.'

The rest of the conversation related to Fred, told him that he was in Special Crimes, had been in Special Crimes and would be available if he changed his mind and wanted to talk to him at any point that he was going to go ahead and remain there at Special Crimes."

information, or arraignment' "[16] and the *Fifth* Amendment right to have counsel *"present during custodial interrogation"*[17] identified by Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 64 L.Ed.2d 297 (1966), both of which were made applicable to the states through the Fourteenth Amendment.

Therefore, the threshold issue we confront is whether either or both of these federally secured rights had attached, or been invoked, at the time appellant imparted to agents of the State his involvement in the instant offense.

It appears clear that the nearest appellant came to having had "judicial proceedings initiated against him," or having been "formally charged" with an offense, was when he was arrested on the "accusation" of "kidnapping and robbery" on January 24, then held until he testified before the grand jury the next day. It is undisputed that appellant was assisted by counsel at all times during that period.

From the time he was released on January 25 until he implicated himself in the offense on January 27, appellant was not charged with anything, see n. 13, *ante*, and was in fact, being illegally held by the State.[18] More-

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16. Brewer v. Williams, 430 U.S. 387, 398, 97 S.Ct. 1232, 51 L.Ed.2d 424 (1977), quoting Kirby v. Illinois, 406 U.S. 682, 689, 92 S.Ct. 1877, 32 L.Ed.2d 411 (1972).

17. Edwards v. Arizona, 451 U.S. 477, 482, 101 S.Ct. 1880, 68 L.Ed.2d 878 (1981). See also Rhode Island v. Innis, 446 U.S. 291, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980); and Stone v. State, 612 S.W.2d 842 (Tex. Cr. App. 1981).

18. Indeed, had appellant sought suppression of his confession on *Fourth* Amendment grounds, alleging it was a product of this illegal detention, see Green v. State, 615 S.W.2d 700 (Tex. Cr. App. 1981), our task would be simplified, but, though raised in the trial

over, the record discloses with clarity that the authorities had no real sense of appellant's involvement in the offense, and in fact believed it possible that, though he had knowledge of it, he was not actually involved at all. Cf. Escobedo v. Illinois, 378 U.S. 478, 84 S.Ct. 1758, 12 L.Ed. 2d 977 (1964); and Massiah v. U.S., 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed.2d 246 (1964).

It therefore appears that no judicial proceedings had been initiated against appellant by formal charge or in any other traditional form. However, the State concedes and, indeed, it is uncontradicted in the testimony, that appellant was taken into the State's custody (albeit unlawfully) when he refused to talk to the prosecutors in the wee hours of January 27, at the hospital; he was at that time warned of his *Miranda* rights by Detective Carpenter; his desire not to talk further with the authorities had been repeatedly expressed; he was represented by retained counsel at that point and had been accompanied by counsel during all discussions with agents of the State up to that point; and, finally, before departing the hospital between 1:30 and 2:00 a.m., appellant's counsel had clearly indicated his client was not to be questioned in his absence.

Thus, we need not decide whether appellant's representation by counsel at a time when adversary proceedings had not yet commenced, *alone* activated his Sixth and Fourteenth Amendment right to the assistance of counsel,[19] because it is abundantly clear that his Fifth

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court and neglected by the trial judge in his findings, the Fourth Amendment claim has not been pursued on appeal.

19. "In both *Massiah* and *Williams* the challenged statements were obtained at a time when judicial proceedings had been initiated against the accused *and* he had already obtained coun-

and Fourteenth Amendment right to have counsel present during any custodial interrogation had been asserted at the time relevant to our inquiry. Stone v. State, 612 S.W. 2d 542 (Tex. Cr. App. 1981).

Waiver

It is likewise plain that appellant's counsel was not present at the time he gave his statement; neither was appellant's counsel with him during the 15 hours which preceded the written statement.[20] Accordingly, the next question before us is whether appellant waived his formerly invoked right to the presence of his attorney during custodial interrogation.

Concerning circumstances such as those before us, the Court in *Miranda,* supra, at 475 U.S. stated:

> "If the interrogation continues without the presence of an attorney and a statement is taken, *a heavy burden rests on the government to demonstrate* that the defendant knowingly and intelligently waived his privilege aganist self-incrimination and his right to retained or appointed counsel."

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sel. It is fairly clear, however, that the commencement of adversary proceedings *alone* activates the right to counsel. * * * Whether representation *without more* triggers the right to counsel is a good deal less clear. . . . The Supreme Court is likely to so hold, at least when law enforcement officers treat the defense lawyer deceitfully or disdainfully." [Emphasis original] [citations omitted] YALE KAMISAR, Brewer v. Williams, Massiah *and* Miranda: *What Is Interrogation? When Does It Matter?,* in POLICE INTERROGATION AND CONFESSIONS 142, n. 6 (1980).

20. The trial court's finding that appellant "had access or actually conversed with or was counseled by" the retained attorney of his choice *"at all times,"* finds no support in the record before us.

See also Butler v. North Carolina, 441 U.S. 369, 372-373, 99 S.Ct. 1755, 60 L.Ed.2d 286 (1979); and Faulder v. State, 611 S.W.2d 630, 641 (Tex. Cr. App. 1980) (Opinion on State's Motion for Rehearing). Thus, the question of waiver turns on whether the State has met its "heavy burden" of establishing a "knowing and intelligent relinquishment or abandonment of a known right or privilege, a matter which depends in each case 'upon the particular facts and circumstances surrounding the case, including the background, experience and conduct of the accused.' Johnson v. Zerbst, 304 U.S. 458, 464 (1938) [other citations omitted]." Edwards v. Arizona, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981); Wyrick v. Fields, ____U.S.____, 103 S.Ct. 394, 74 L.Ed.2d 214 (1982).

The State's brief contends that since appellant was given repeated warnings and there is no evidence of coercion, his confession was voluntary. Similarly, the trial court found no threats or coercion were applied and the confession was voluntarily obtained. But the question of "voluntariness" is an inquiry discrete from whether a knowing and intelligent waiver occurred; accordingly, however voluntary the statement may have been, the issue of waiver is not thereby resolved. *Edwards,* supra. The State also contends that appellant's "refusal to summon" his attorney "despite [the] advice that [he] keep silent and call Dailey in before making any further statements" strongly indicates appellant did not want counsel present *while giving the confession.* Even if these factual assertions were supported by the record,[21] they are irrelevant.

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21. We note that there is neither evidence appellant "refused" to summon his attorney, nor evidence his attorney instructed appellant to "call Dailey in" should the police start to interrogate him

For our understanding of the right involved here, is that the Fifth Amendment guarantees the presence of counsel during *interrogation,* which by definition is designed to elicit,[22] and therefore necessarily precedes, an incriminating response. Moreover, on the question of waiver,

> "*Miranda* teaches that no weight is to be given a failure on the part of the accused to specifically request an attorney's assistance or that interrogation cease in the exact language of that case, or, for that matter, at all; likewise, the mere fact 'that appellant answered the officers' questions raises no presumption of waiver.' "

611 S.W.2d at 641. And the Court in *Edwards* concluded that analysis by observing that Edwards' "statement, made without having had access to counsel, did not amount to a valid waiver. . . ."

What then must the State prove in this context in order to establish waiver?

> ". . . [A]lthough we have held that after initially being advised of his *Miranda* rights, the accused may himself validly waive his rights to respond to interrogation, see North Carolina v. Butler, supra, at 372-376, the Court has strongly indicated that *additional safeguards are necessary when the accused asks for counsel;* and we now hold that when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated cus-

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again. Clearly, Dailey relied on the State's understanding that questioning was not to commence again in his absence.

22. *Rhode Island v. Innis,* supra; McCrory v. State, 643 S.W.2d 725 (Tex. Cr. App. 1982).

> todial interrogation even if he has been advised of his rights. We further hold that *an accused,* such as Edwards, *having expressed his desire to deal with the police only through counsel, is not subject to further interrogation* by the authorities until counsel has been made available to him, *unless the accused himself initiates further communication, exchanges or conversations with the police.*"

Edwards, supra, at 484-485.

In oral argument before this Court, the State by inference conceded that appellant's right to counsel's presence during custodial interrogation had been invoked but abridged, by characterizing his coincidental meeting with his attorney by the water fountain as a "happy accident" which broke "in favor of the State." Arguing that this conversation illustrated appellant's knowing relinquishment of counsel's presence, the State would have us find a constitutionally adequate waiver.

Yet, the record developed upon appellant's motion to suppress is virtually silent as to the whereabouts of appellant during the preceding 15 hours; indeed, evidence of which party—the accused or the State—initiated "further communication, exchanges or conversations," is notably absent.[23] The fact that agents of the State caused appellant's attorney to believe he should be at the courthouse off and on throughout the morning and early afternoon might support an inference that the State deliberately

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23. The only evidence in this regard breaks against the State. See *ante* at 6-7 wherein Detective Carpenter talked to appellant after Dailey left the hospital, and told him he understood his lawyer's wishes, but that if appellant wanted to talk, it was his and no one else's decision. Appellant told Carpenter again that he did not want to talk about it.

engineered appellant's separation from him during this time. Thus, under the totality of the circumstances established,[24] the State has fallen short of its burden of proof, and we so hold.

This case illustrates why the burden is appropriately placed on the State to affirmatively prove the accused initiated further contact with agents of the State: the reason the State did not prove appellant initiated contact with the police is that the State *could not* prove it. Testimony finally adduced by the State at trial[25] revealed that on the morning of Friday, January 27, Houston Police Captain L. N. Zoch dispatched Detectives Burkham and Beale at 11:00 a.m. to the Rosewood Hospital to pick up appellant and bring him back to the Robbery Division —*not* the city jail. Appellant was brought in at around noon and taken into Zoch's office. Over the next hour, Detectives Burkham, Beale, Musick, Carpenter and Williams talked to appellant in varying combinations.[26]

At 1:00 p.m., Captain Zoch, accompanied by a Detective Kent took over the interrogation. According to Zoch, after two to three hours of "discussion," appellant made a request: "he would like to discuss this further after he would be—if he were permitted to call Mrs. Fantich and

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24. The question of waiver must be determined from the totality of the circumstances. *Wyrick,* supra; *Edwards,* supra.

25. We do not resolve the issue on this testimony given at trial. We merely note it in order to illuminate the fact that the State's failure to meet its burden of proof was not an oversight.

26. It is interesting to note that, other than Burkham and Beale, all of these detectives were called by the State to testify at the hearing on the motion to suppress. However, they were never asked to testify about their activities on January 27 before 2:00 p.m. Burkham and Beale, it will be recalled, picked appellant up from the hospital on the order of Captain Zoch.

discuss matters with her." Asked on crossexamination how appellant's "request" came about, Zoch replied:

> "We had a long discussion. I don't know, sir, if you want me to go into the topic prior to this request or not.
>
> Q: Well, let's just put it this way: You were attempting to convince him to make a voluntary statement? Would that be a fair question?
>
> A: We were—I wanted some information very badly, yes, sir."

There is no question appellant was subjected to further interrogation in the absence of his lawyer. The State has failed to meet its heavy burden of establishing he knowingly and intelligently waived his right to counsel's presence during interrogation, because there is no evidence that the interrogation was initiated by him subsequent to his assertion of that right.[27] Accordingly, the trial court reversibly erred by admitting appellant's statement obtained under these circumstances for the jury's consideration at his trial, and we are constrained to so hold.

The judgment of conviction is reversed and remanded.

CLINTON, Judge

(Delivered May 18, 1983)

EN BANC

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27. Even under the more open approach to the waiver question expressed by Justice Powell, concurring only in the judgment of the Court in *Edwards*, the State has failed to meet its burden of proof in the instant case, *viz*: "a free and knowing waiver of counsel *before interrogation commenced.*"

NO. 68,937

CLAUDE LEE WILKERSON, Appellant

v.

THE STATE OF TEXAS, Appellee

Appeal from Harris County

DISSENTING OPINION

I agree with the majority that appellant did invoke his *Miranda* right to have counsel present at interrogation. Stone v. State, 612 S.W.2d 542 (Tex.Cr.App. 1981). And I agree that the questioning of appellant by Burkham, Beale, Williams and Zoch in Zoch's office was improper. However, I strongly believe that any taint caused by that improper questioning was removed when appellant consulted with his attorney *before* he gave his confession.

The record shows that during the "discussion" in Zoch's office appellant agreed to give the police information if he would first be permitted to talk with Pat Fantich, the wife of one of the victims. Appellant and several police officers then proceeded to Mrs. Fantich's home, picked her up and proceeded to the Special Crimes Bureau.

Assistant District Attorney Mike Hinton testified that he received information that afternoon that appellant wanted to talk with him. After receiving this information, he made arrangements for appellant's attorney, Fred Dailey, to come to his office. Hinton testified that Dailey was present in the Special Crimes Bureau before he began talking with appellant. He also testified that appellant

was aware his attorney was present, but appellant never asked to see his attorney. Hinton testified that he talked with appellant for five or ten minutes. Appellant then talked with Mrs. Fantich for approximately thirty minutes. While they were talking, Hinton went in and talked with appellant's attorney, Fred Dailey.

"Q. At the time that you talked with Fred Dailey, did he ask you where his client was?

"A. He knew where he was. He was around the hall in your office.

"Q. And approximately how far was that away from where Mr. Dailey was sitting?

"A. Thirty-five feet, I guess."

After appellant concluded his talk with Mrs. Fantich, he again talked with Hinton.

"A. . . . Our talk, between J. C. (appellant) and myself was not about the elements of the crime. It was about personal feelings that he had and fears and thoughts and decisions that he was having to make at that time."

Hinton testified he then left the room and proceeded to his own office where he talked with Dailey and Judge I. D. McMaster, who was there waiting to pick up his wife.

Earl Musick, a detective with the Houston Police Department, testified that he brought Mrs. Fantich and appellant to the Special Crimes Bureau on that Friday. After appellant and Mrs. Fantich talked and appellant had talked with Hinton, appellant began telling his story. As appellant began dictating his confession, he asked to go to the restroom.

"Q. During this process of going to the restroom, did you encounter any person who was not involved in law enforcement or attached to the District Attorney's Office?

"A. Yes, sir, Fred Dailey.

"Q. Did Fred Dailey have a conversation with Claude Wilkerson in your presence?

"A. Yes, sir, he did.

" * * *

"Q. Can you tell us what you overheard there of that conversation?

"A. Fred Dailey asked Claude if—
He said, 'Claude, don't you want to talk to me?' Claude replied, 'No.'

" * * *

"A. Fred asked Claude if he was sure that he did not want to talk to him and Claude said, 'Yes.'

Fred asked Claude if he knew what he was doing. Claude said, yes, he did. He asked Claude, 'Are you doing what you want to do?' Claude then said, 'I do not guess anyone would want to give a confession, but you know, I have to.'

And Fred said, 'Now, wait a minute. You have to?' And he said by this, 'Are you saying that they are threatening you? Are they making you do something you don't want to do?' Claude said 'No. They have nothing to do with it. It's my own personal reasons. You know I have to tell the truth.'

And Fred said, 'Well, you know what I have advised you and are you aware of all this?' And he said, 'Yes.'

> The rest of the conversation related to Fred, told him that he was in Special Crimes, had been in Special Crimes and would be available if he changed his mind and wanted to talk to him at any point that he was going to go ahead and remain there at Special Crimes."

Musick went on to state that appellant then gave a written confession.

Fred Dailey, appellant's attorney, testified that on Friday, January 27, 1978, when he appeared for a hearing concerning appellant, he was instructed to go to the Special Crimes Bureau. He arrived there at approximately 1:30 p.m. Dailey testified that when he arrived he was told appellant was there. When Dailey asked if appellant had asked for him, he was told "no." Sometime during the afternoon, Dailey ran into appellant at the water fountain.

"Q. At this point, did you have a conversation with your client?

"A. Yes.

"Q. What did you ask your client?

"A. . . . But, I know I asked if he was doing what he wanted to do. And he replied, 'No, not really.' And I said, 'Then, stop it.' And he said, 'No, I have to. I have to do it.' And I said, 'Well, then, what you are really saying is, you are doing what you want to do but you don't like it?' and he said, 'Yeah, I guess so.'

"Q. At that time, did he ask to speak with you?

"A. No.

"Q. And you were having a face-to-face conversation with him?

"A. Yes.

"Q. Was that all of the conversation that you recall?

"A. I said, 'Well, I've been here and I will be here if you want me. I'm here.' "

Dailey further testified:

"Q. During this entire period of time, you had access to Claude Wilkerson or he had access to you?

"A. Yes.

" * * *

"Q. Were you satisfied after you had the conversation with Claude at the water fountain in the Special Crimes Division on Friday, that he did not want to see you?

"A. Yes."

In Edwards v. Arizona, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981), the Supreme Court of the United States held that, when an accused has expressed a desire to deal with police only through counsel, the accused is not subject to further interrogation until counsel has been made available to him, or unless the accused himself initiates further communication, exchanges or conversation with the police. As Chief Justice Warren wrote in Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 64 L.Ed.2d 297 (1966):

> "Our aim is to assure that the individual's right to choose between silence and speech remains unfettered throughout the interrogation process." 86 S.Ct. at 1625.

Where, as in the instant case, the appellant talked with his attorney before he gave his confession, and still insisted on making a confession, I feel that the goals of *Miranda* were met. Appellant made a knowing and counseled confession. Appellant's own attorney was convinced that appellant was aware of what he was doing and was cooperating with police knowingly and voluntarily. Under these circumstances, the taint was removed. Appellant's confession was not taken in violation of his Fifth Amendment right to counsel.

For the above reasons, I dissent.

McCORMICK, Judge

(Delivered May 18, 1983)

En Banc

W. C. Davis, Miller and Campbell, JJ, join in this dissent.

APPENDIX B

CLERK'S OFFICE

COURT OF CRIMINAL APPEALS

AUSTIN, TEXAS

I, THOMAS LOWE, Clerk of the Court of Criminal Appeals of Texas, do hereby certify that in Cause No. 68,937 styled:

CLAUDE LEE WILKERSON, Appellant

v.

STATE OF TEXAS, Appellee

the judgment of the 208th Judicial District Court of Harris County, Texas was REVERSED AND REMANDED on May 18, 1983, on July 20, 1983 the State's motion for leave to file motion for rehearing was denied and on September 14, 1983 the motion for leave to file the State's Second motion for rehearing was denied. The mandate of this Court has been stayed and therefore with the denying of leave to file the State's Second motion for rehearing this cause became final on the docket of this Court on September 14, 1983.

WITNESS my hand and the seal of said Court, at my office in Austin, Texas, this the 14th day of October, A.D. 1983.

/s/ THOMAS LOWE
Thomas Lowe, Clerk of the
Court of Criminal Appeals
of Texas.

(Seal)